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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

* * *

RICHARD CORNETT,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

3:07-cv-0131-LRH (RAM)

UNITED STATES' MOTION FOR
LEAVE TO PARTICIPATE IN
SETTLEMENT CONFERENCE
WITHOUT THE APPEARANCE OF THE
ASSISTANT ATTORNEY GENERAL
FOR THE CIVIL DIVISION

Comes now the defendant United States, through its undersigned counsel, and moves this court for leave to participate in the settlement conference scheduled for February 5, 2008, without the appearance of the Assistant Attorney General for the Civil Division. This motion is supported by the representations and discussion set forth below.

I. INTRODUCTION

This is an action for damages on account of alleged medical malpractice brought against the United States under the Federal Tort Claims Act (FTCA). Pretrial discovery conducted to date has revealed that plaintiff Richard Cornett has a significant disability which may require extensive medical monitoring and intervention as well as nursing care and other supportive care, all of which plaintiff alleges to be compensable damages recoverable in this action.

1 A settlement conference has been scheduled for February 5, 2008. This court's order
 2 (#21) regarding the settlement conference states, among other things, that "an authorized
 3 representative" of each client (including governmental entities) be present at the settlement
 4 conference and that such authorized representative be a person with "final settlement authority"
 5 to commit "in the representative's own discretion" to a settlement up to the amount of the
 6 plaintiff's last settlement demand.

7 The United States has been represented by the U.S. Attorney's Office and the
 8 undersigned Assistant United States Attorney throughout the course of this medical malpractice
 9 action. As discussed below, there is good cause for the court to allow the scheduled settlement
 10 conference to proceed in accordance with the settlement procedures established by applicable
 11 Department of Justice regulations, without the presence of the Assistant Attorney General of the
 12 Civil Division.

13 14 II. DISCUSSION

15 Pursuant to 28 USC §§ 516-519, the Attorney General of the United States is vested
 16 with authority to conduct all litigation on behalf of the United States and its agencies and
 17 officers, unless otherwise provided by law. Under 28 USC § 2677, the Attorney General has
 18 authority to settle any FTCA claim.¹ Not surprisingly, a portion of this authority has been
 19 delegated (and re-delegated) to various subordinate officials within the U.S. Department of
 20 Justice (DOJ). The Attorney General has delegated settlement authority in civil cases to certain
 21 DOJ officials, including the Assistant Attorney General for the Civil Division, so long as the
 22 principal amount of the proposed settlement does not exceed \$2 million. See 28 C.F.R. §
 23 0.160(a)(2). The compromising of claims beyond that limit must be approved by the Deputy

24
25 ¹ The Attorney General also has the "inherent authority" to compromise any
 26 action insofar as it involves the United States or its agencies and officials,
 independent of any express statutory provision. See Swift & Co. v. United States,
 276 U.S. 311, 331-32 (1928).

1 Attorney General, or Associate Attorney General, as appropriate. See 28 C.F.R. §§ 0.161(b).

2 The Assistant Attorney General for the Civil Division has redelegated portions of the
3 Attorney General's settlement authority to United States Attorneys (and to various Branch
4 Directors of DOJ litigating divisions in Washington, DC). Based on that redelegation, the
5 United States Attorneys have the authority to settle all cases against the United States where the
6 principal amount of the settlement does not exceed \$1 million. See 28 C.F.R. Ch. 1, Pt. O,
7 Subpt. Y. In cases where the settlement value exceeds \$1 million, the approval of the Assistant
8 Attorney General or (as the case may be) the Associate Attorney General must be obtained. In
9 order to accomplish this, the United States Attorney must make a written request for such
10 approval, with such a request being subject to multiple intermediate reviews and
11 recommendations within DOJ.

12 The legislative history of the Judicial Improvements Act of 1990, 28 USC § 471, *et seq*,
13 reveals Congress' acknowledgement of the centralized decisionmaking by the United States
14 because of the large volume of cases litigated by the United States: "[t]he Department [of
15 Justice] does not delegate broad settlement authority to all trial counsel, but instead reserves to
16 senior officials in the United States Attorneys' Offices or in the litigative divisions in
17 Washington." See S.Rep.No. 416, 101st Cong., 2d Sess. 1990, *reprinted in* 1990
18 U.S.C.C.A.N. 6802, 6848.

19 In In re Stone, 986 F.2d 898, 903 (5th Cir. 1993), the Fifth Circuit, in discussing DOJ's
20 settlement procedures, stated:

21 The purpose of the structure established by the Attorney General is
22 to promote centralized decisionmaking on important
23 questions...Centralized decisionmaking promotes three important
24 objectives. First, it allows the government to act consistently in
25 important cases, a value more or less recognized by the Equal
26 Protection Clause. Second, centralized decisionmaking allows the
executive branch to pursue policy goals more effectively by
placing ultimate authority in the hands of few officials. Third, by
giving authority to high-ranking officials, centralized
decisionmaking better promotes political accountability. Given the
reasonable policy justifications for the Justice Department's
settlement regulations and the insignificant interference with the

1 operation of the courts, the district court abused its discretion in
2 not respecting those regulations.

3 In United States v. Mendoza, 464 U.S. 154, 159-60 (1984), the Supreme Court also
4 acknowledged the unique burden on the United States in litigation:

5 [w]e have long recognized that ‘the Government is not in a
6 position identical to that of a private litigant,’ both because of the
7 geographic breadth of government litigation and also, most
8 importantly, because of the nature of the issues the government
9 litigates. It is not open to serious dispute that the government is a
10 party to a far greater number of cases on a nationwide basis than
11 even the most litigious private entity.

12 The United States (and its undersigned counsel) fully appreciates the important role of
13 settlement conferences in civil litigation and also recognizes the importance of meaningful
14 participation in such conferences. Undersigned counsel has participated in a multitude of such
15 conferences conducted by this court without the presence of high-ranking DOJ officials. It
16 would be (1) excessively burdensome and (2) serve no purpose to require the presence of the
17 Assistant Attorney General for the Civil Division at the February 5 settlement conference (as the
18 order suggests is required). It is the United States Attorney’s Office that will determine whether
19 this case has settlement value and, if so, whether that value is within the settlement authority of
20 the United States Attorney or above. If it is above, the Assistant Attorney General for the Civil
21 Division (or the Associate Attorney General) will learn of the pendency of this action and act on
22 a settlement proposal only through an institutional process which includes multiple levels of
23 intermediate review and recommendation, a process which begins with a written request by the
24 United States Attorney. It would be extremely burdensome to require the Assistant Attorney
25 General to attend the hundreds of mediation and settlement conferences every year in FTCA
26 litigation across the nation and, given the settlement approval process within DOJ, it would not
be productive to require such attendance.

Consistent with past practice, the undersigned will ensure that this FTCA action is
thoroughly evaluated by appropriate officials within the U.S. Attorney’s Office and other

1 appropriate DOJ officials in advance of the settlement conference. The expectation is that the
2 undersigned will participate in the settlement conference along with the Chief of the Civil
3 Division of the U.S. Attorney's Office and an attorney representative of the Department of
4 Veteran's Affairs. It is also anticipated that additional DOJ officials in Washington, D.C., who
5 may have a role in processing approval of a settlement proposal, will be available by telephone
6 throughout the course of the settlement conference and be familiar with this action.

7
8 III. CONCLUSION

9 For the foregoing reasons, it is respectfully requested that the United States be granted
10 leave to participate in the settlement conference scheduled for February 5, 2008, without the
11 appearance of the Assistant Attorney General for the Civil Division.

12
13 Respectfully submitted,

14 GREGORY A. BROWER
15 United States Attorney

16
17 /s/ Greg Addington
18 GREG ADDINGTON
19 Assistant U.S. Attorney

20 IT IS SO ORDERED.

21 
22 UNITED STATES MAGISTRATE JUDGE

23 DATED: _____ January 14, 2008 _____
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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing UNITED STATES' MOTION FOR LEAVE TO PARTICIPATE IN SETTLEMENT CONFERENCE WITHOUT THE APPEARANCE OF THE ASSISTANT ATTORNEY GENERAL FOR THE CIVIL DIVISION was made through the Court's electronic filing and notice system or, as appropriate, by sending a copy of same by first class mail, addressed to the following addressees, on this 11th day of January, 2008.

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/s/ Greg Addington
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